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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Petition of	)	
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CELLULAR COMMUNICATIONS	)	
OF PUERTO RICO, INC.,	)	RM-8897
	)	
To Determine Whether Competitive	)	
Bidding Procedures Should Be Used	)	
To License Rural Service Areas	)	

To: Wireless Telecommunications Bureau

REPLY COMMENTS OF
BELL ATLANTIC NYNEX MOBILE, INC.

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SUMMARY

This proceeding presents the Commission with a clear choice: Should it continue to rely on the discredited lottery system to award licenses for remaining cellular RSA markets, or should it instead open these markets to competitive bidding? BANM and Western Wireless Corp. supported CCPR's petition to use auctions, while the other commenters supported lotteries.

There can be no dispute, however, as to which method serves the public's interest, and the Commission must not lose sight of that cardinal fact. Congress and the Commission have repeatedly found that lotteries do not serve the public, and that auctions do. The Commission cannot decide to relottery these markets and remain faithful to its statutory mandate to act in the public interest.

Commenters who favor lotteries notably do not attempt to defend that method as serving the public interest, and instead focus on their private interest.

But there are no plausible private interests that come close to supporting a choice of lotteries over auctions here.

> -- Pro-lottery commenters misread the Communications Act to argue that it prohibits the Commission from conducting auctions. As the Commission has held, it clearly has the authority to use auctions.
>
> -- These commenters next claim that adopting auctions would be unlawful retroactive regulation. Again, and just as clearly, they are wrong. The Commission and the courts have repeatedly held that the agency is empowered to modify the rules applicable to previously-filed applications as long as it follows notice and comment rulemaking. That is precisely what it is doing here.
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> -- Pro-lottery commenters then claim that "fairness" prevents the Commission from modifying its rules. Such claims by private applicants, particularly ones who did nothing more than buy a chance to a lottery, cannot lawfully override the public's strong interest in using another method that will finally bring new service to these rural areas. Claims of unfairness are in any event unsupported.
>
> -- If an auction is used, these parties at least hope to restrict the bidding competition, and therefore argue that new interested parties or those that hold interim authorizations for the RSAs should be excluded. But the caselaw clearly allows the Commission to announce a new filing window, and in any event restricting participation would undermine the goals of the auction system.

The Commission should thus grant CCPR's Petition and propose rules for issuing licenses for open RSA markets by competitive bidding.

I. AUCTIONS MUST BE USED BECAUSE THEY WILL SERVE THE PUBLIC INTEREST AND LOTTERIES WILL NOT.

In all of its actions, the Commission must be guided by its fundamental mission of awarding radio licenses pursuant to rules that it finds will best achieve the public interest. This is not a mere truism; the Communications Act requires

the Commission, when considering alternative rules, to determine which option best serves the public interest.[1] The Commission cannot relottery the open RSA markets without violating that statutory mandate, because it cannot find that relotteries will be in the public's best interest.

The Commission often faces a difficult choice among alternative rules for awarding and regulating licenses because each alternative can be viewed as having public interest benefits. Here, however, the choice is clear, for Congress created one option (auctions) precisely because it found that the other (lotteries) was actually harming the public interest. Congress enacted competitive bidding authority in reaction to evidence before it that lotteries are inefficient, encourage speculative applications, result in unqualified persons winning the license, and delay service to the public.[2] In contrast, since receiving auction authority in 1993, the Commission has found that auctions are an expeditious and efficient method of awarding multiple licenses which recovers a portion of the value of the spectrum for those who in fact own it -- the American public.[3] Congress has endorsed these findings by recently directing the Commission to auction on an expedited basis 50

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[1]See, e.g., Section 303, which authorizes the Commission to promulgate regulations, award radio licenses, and take other actions "as public interest, convenience or necessity requires."

[2]H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 248 (1993).

[3]Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order, 9 FCC Rcd 2346 (1994). See BANM Comments at 5-7.

mhz of new spectrum.[4] Commenters that favor lotteries limit their claims to alleged private harms, but do not (and could not) make the claim that continuing with the lottery system will serve the public's interest.

One example demonstrates the gap between the arguments of pro-lottery commenters and the public interest findings the Commission must make here. They assert that lotteries can be conducted faster, whereas auctions will take additional time.[5] But speed in conducting the selection is not the issue, speed in getting service to these markets is. Proper licensing decisions cannot lawfully be sacrificed to speed. The public interest need here is that these rural areas, more than six years after most other markets were licensed, still do not have a permanent nonwireline licensee to provide competitive cellular service. Instituting new service, not hurrying a selection process, is the right goal.

When the question is properly framed, the answer is clear: Lotteries will be far slower than auctions in getting service started. It is the lottery system, after all, that led to speculative applications which in turn frustrated and denied A-side cellular service to these rural areas. Moreover, because the RSA applications were filed many years ago, the tentative selectee in any relottery may not even surface or may have disbanded, necessitating still another relottery. Even if it comes forward as the tentative selectee, it will of course be vigorously investigated by the

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[4]Omnibus Consolidated Appropriations Act, 1997, P.L. 104-208, 100 Stat. 3009 (1996), Section 3001.

[5]E.g., Comments of Crystal at 3; JMC et al. at 4-5 ("the lottery technique would take only a few hours to complete").

remaining applicants. All that a relottery will accomplish is to restart the process of litigation that has held up service for so many years. In contrast, any party that bids for the license at auction will have an immediate incentive to implement service so that it can recoup its investment.

The Commission should also note that the lack of support for relotteries by more than a tiny number of existing applicants militates against using that method. There are more than 3,600 applications pending for the six RSA markets for which lotteries were postponed, involving more than 500 different applicants. Of these hundreds of applicants, only a small fraction have opposed CCPR's petition.[6] This meager level of interest shows that the RSA applications are stale and that the Commission should not risk awarding the RSA licenses by lottery. If by far most applicants are not interested in whether the Commission should dismiss their applications and conduct an auction, the Commission can hardly be

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[6]Only 27 applicants identified themselves in the comments. Committee to Preserve Lottery Selection (CPLS) (12 applicants); RSA Applicants (4); JMC Enterprises/SDK Enterprises/Donald J. Kunkle/Formula 1 Cellular (JMC et al.) (4); Moving Phones Partnership, L.P./FutureWave General Partners, L.P. (Moving Phones) (2); Price Communications Cellular, Inc. (Price) (1) Crystal Communications Systems (Crystal) (1); Darsh Aggarwal (1); TME Cellular Partners (TME) (1); Richard L. Vega Group (1).

RSA Operators Group (RSAOG), Applicants Against Lottery Abuse (AALA), and Thomas Domencich/Committee for a Fair Lottery (CFL) do not identify whom they represent, although AALA (at 6) says that the applicants involved in challenging the original selectees numbered "more than fifty." Given these groups' complaints as to CCPR's compliance with the rules for ex parte communications, and given that one purpose of those rules is to permit parties in a proceeding to know which others have made communications to the Commission, one would have expected these groups to have identified the applicants whom they claim to represent.

confident that they would be interested in building out a cellular system if they win the relottery. Past experience with lotteries shows that, at best, many will turn and sell it in a "private" auction which will not benefit the public, but will only further delay service to rural areas of the nation that have waited years for a permanent A-side competitor.

The Commission cannot make the finding that relotteries will achieve the goal of rapid deployment of competitive cellular service in these RSAs or would otherwise serve the public interest. The only lawful course is to dismiss the applications without prejudice to their competing in the auction with all other interested bidders.

II. THE COMMUNICATIONS ACT DOES NOT PROHIBIT AUCTIONS FOR THE OPEN RSAs.

The Commission has repeatedly, and correctly, held that the Budget Act gives the Commission the authority to award licenses by lottery or competitive bidding under the circumstances here.[7] Nothing in the pro-lottery comments offers any plausible basis for denying the Commission that authority.

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[7]Even when the Commission decided to use lotteries, it explicitly confirmed its authority to use auctions. Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and Instructional Television Fixed Service, 10 FCC Rcd 9589, 9631 (1995) ("MMDS Lottery Order") ("There is no doubt that we have the authority under the statute to use auctions to dispose of these previously filed applications . . . [T]he question before us here is not whether we may utilize an auction, but whether we should."). See also Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 9 FCC Rcd 7387 (1994) ("Unserved Area Lottery Order"), 9 FCC Rcd 7387 (1994). See Comments of BANM at 2-4, Western Wireless at 3-4.

Several commenters[8] attempt to rely on what they refer to as the "Special Rule" in the Omnibus Budget Act of 1993 as authority for prohibiting the Commission from using auctions, but in fact they turn the Budget Act on its head. The Special Rule precludes the use of lotteries unless the Commission finds that this process is consistent with the lottery provision of the Act, Section 309(i), and "one or more applications for such license were accepted for filing by the Commission before July 26, 1993."[9] The Special Rule did not prohibit auctions for pre-enactment applications; it prohibited lotteries for later-filed applications. For pre-enactment applications, Section 309(j) gives the Commission the alternative of using lotteries or competitive bidding, and does not dictate the method by which the Commission should award RSA licenses.

AALA asserts that the Senate bill, which had stated that auctions should only be used for granting "new spectrum licenses," was "incorporated by reference into the final Conference Report." This is flatly wrong. The Conference Report nowhere states that this language was being incorporated, and in fact, it was completely dropped from Section 309(j) as enacted.[10] The final Budget Act compromised between the House's approach (no lotteries for any applications, new or old) and the Senate's approach, by requiring auctions for later applications but

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[8]Comments of AALA at 3-4, TME Cellular at 3, Crystal at 5-6, CPLS at 2-4.

[9]Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, § 6002(e), 107 Stat 312, 397 (1993).

[10]H. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. at 485 (1993). For this reason, CPLS's reference (Comments at 19) to the Senate debate on the Senate bill as supporting lotteries for pending applications is not pertinent.

leaving it up to the Commission as to the processing of prior-filed applications. If anything, Congress' decision to omit the Senate language demonstrates its intent that pending applications can be awarded by competitive bidding.

III. USING AUCTIONS WOULD NOT BE UNLAWFULLY RETROACTIVE BECAUSE THE COMMISSION HAS AUTHORITY TO CHANGE THE RULES FOR SERVICES WITH PENDING APPLICATIONS.

Opponents of auctions also brand the use of competitive bidding for the remaining RSAs as unlawful, "retroactive" rulemaking.[11] They seize on this label as if its mere invocation will invalidate the auction proposal. In doing so, these commenters ignore the law, and confuse the permissible use of new rules to regulate pending applicants with retroactive application of a rule.[12] The former raises no legal concern, and the latter is only barred if "'the ill effect of the retroactive application' of the rule outweighs the 'mischief' of frustrating the interest the rule promotes."[13] Neither apply here. Awarding these markets through competitive bidding would not constitute impermissible retroactive rulemaking, because the Commission has authority to change its rules for a radio service where there are pending applications for that service.

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[11]Comments of RSAOG at 4; TME Cellular at 5-6; TMC et al at 10; CPLS at 7-11; AALA at 3-5.

[12]See Landgraf v. USI Film Products, 114 S.Ct. 1483, 1499 (1994) (distinguishing between cases of true retroactive effect and those where the conduct in question merely preceded the enactment of the statute to be applied).

[13]Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1554 (1987) (quoting SEC v. Chenery Corp., 332 U.S. 194, 203 (1947)).

The crucial issue in deciding whether a rule is retroactive is "whether the new provision attaches new legal consequences to events completed before its enactment," or more specifically, "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Landgraf, 114 S. Ct. at 1505. Commenters favoring lotteries focus on the first element, claiming that changing the processing rules would deprive them of some "right" to the same rules under which they filed. They are incorrect because these parties have no right that would be unlawfully impaired.

A. The Commission May Change Its Processing Rules For Pending Applications.

Parties with pending applications have no vested rights in any particular selection procedure that override the Commission's determination that changing the procedure is in the public interest. Even Commission licensees do not have any perpetual right to use the spectrum awarded them according to the rules existing at the time they received their licenses. It is a fundamental premise of the Communications Act that radio spectrum belongs to the public, and thus any licensee, as a condition for receiving its license, waives any claim of right to any frequency. See, e.g., Section 304. Neither licensees nor applicants have the right to a "guaranteed" set of rules.

Cases dating as far back to Storer Broadcasting[14] have consistently held that as long as the Commission changes its application processing or eligibility rules by notice and comment rulemaking in accordance with the Administrative Procedure Act, and gives fair notice of the changes it makes, there is no deprivation of any putative "reliance" or other "right" of an applicant or licensee.

For example, in Hispanic Information & Telecommunications Network, Inc. v. FCC, 865 F.2d 1289 (D.C.Cir. 1989), after applications for new ITFS licenses were filed, the processing rules were changed in a way that effectively precluded some applicants from obtaining a license. The court upheld the new rules, holding: "The filing of an application created no vested right to a hearing; if the substantive standards change so that the applicant is no longer qualified, the application may be dismissed." 865 F.2d at 1294. If the Commission may change its rules in a way that disqualifies a previously-filed applicant, clearly it can change its rules in a way which leaves that applicant qualified but merely requires it to pursue the license through a different process.

And, in adopting a ban on settlements and other new rules for MMDS applicants, the Commission rejected claims by pending applicants that they had any right to preserve the rules in effect when their applications were filed: "Nor are we persuaded by the argument that we lack legal authority to apply the settlement ban to applications pending as of the effective date of our rules.

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[14]United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) (application for new license which had been properly filed under previous rules was lawfully dismissed when Commission changed rules).

It is well settled that the rules applicable to previously-filed applications may be amended."[15]

Many of the applicants attempt to squeeze this situation into the law of retroactivity by claiming their "right" derives from reliance on the lottery system, and that this blocks the Commission from changing its rules. This is not the law. The applicants here confuse a right to participate in the process of changing the rules with a purported right to preserve the rules themselves. The Commission, like other federal agencies, must follow proper notice and comment procedures before it changes its rules to apply to existing applicants or licensees. But as long as it does so, there is no unlawful "retroactivity" in the change. That is precisely what the Commission's response to the CCPR Petition does. There is no infirmity in this action.

The cases cited by the pro-lottery commenters are thus inapposite and in fact support using auctions here. Thus JMC et al. (Comments at 9) cite Mobile Communications Corp. of America v. FCC, 77 F.3d 1399, 1407 (D.C. Cir. 1996) for the proposition that the Commission "must carefully consider applicants' reliance claims." That case, however, did not address the law of retroactivity at all, and it

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[15]Amendment of Parts 1, 2 and 21 of the Commission's Rules Governing Use of the Frequencies in 2.1 and 2.5 GHz Band, 8 FCC Rcd 1444, 1447 (1994). Notably, the Commission made these revisions to "ensure that speculative applications are not rewarded." Id. The same goal warrants grant of CCPR's Petition. Accord, Request for Pioneer's Preference in Proceeding to Allocate Spectrum for Fixed and Mobile Satellite Services for Low-Earth Orbit Satellites, 7 FCC Rcd 1625, 1628 (FCC "may adopt threshold eligibility criteria that affect pending applications if it determines that such rules serve the public interest.").

actually supports changing to auctions in this proceeding. It concerned a narrow-band PCS "pioneer's preference" license granted to Mobile Telecommunications Technologies Corp. (MTel). The FCC had initially granted pioneer's preference winners free licenses, but then reversed course and charged them a license fee. The court found fault not with the Commission's reversal, but with its failure to afford MTel a chance to argue why the rule should not be changed, finding that "Mtel has had no opportunity to put forth arguments and evidence on the question of reliance." 77 F.3d at 1407. The Court expressly distinguished the agency's treatment of the broadband PCS pioneer's preference winners, who were given an opportunity to argue that the rules should not be changed. The court found that process was lawful, did not violate any reliance interest, and did not even mention the concept of retroactivity at all.[16]

In putting CCPR's Petition out for comment, the FCC did precisely what MTel and many other cases have instructed it to do. It is empowered to change the rules applying to parties which had been subject to different rules as long as it follows proper notice and comment procedures.

Commenters also attempt to rely on Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) as authority for banning any change in rules, but this case is

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[16]The MTel court also said : "The mere fact that the Commission reversed its position . . . does not inval-idate the shift. 'An agency's view of what is in the public interest may change . . . as long as the agency supplies a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970)." 77 F.3d at 1407.

clearly inapposite and has no relevance here. Ashbacker applies only where the Commission denies one or more eligible, mutually exclusive parties the opportunity to compete for a license. As many cases have held, Ashbacker does not prevent the agency from modifying its rules in a way that renders a pending applicant ineligible. E.g., HITN, 865 F.2d at 1294 (rejecting Ashbacker claim when FCC changed rules applicable to previously-filed applications). In any event, no RSA applicant is being disqualified by adoption of an auction method here; all may participate under nondiscriminatory rules.

Finally, commenters cite McElroy Electronics Corp. v. FCC, 990 F.2d 1351 (D.C. Cir. 1993) as requiring that applications "are entitled to be evaluated under the FCC's rules as written when the applications were filed."[17] McElroy, however, concerned the adequacy of the notice of a change in its cellular rules, and rejected any retroactivity claim. The court did not object to the substance of the rule change, but rather what it found to be the impermissible burying of the change in a footnote to the rulemaking order. It went on to find that its decision was "in line with our prior opinion in Maxcell," and also concluded that McElroy's alternative claim of unlawful retroactive rulemaking was "not properly before the court." McElroy's teaching, that parties must be given clear notice of what the rules are, is exactly the course the Commission is following here by considering CCPR's Petition through the rulemaking process.

[17]E.g., Comments of TME at 5.

The other tests for finding that a rule may be retroactive are irrelevant. The lottery applicants cannot claim "increased liability" as a result of the use of auctions. While applicants may have spent money for their lottery applications, that money has been incurred, and there is no required further liability that would attach if auctions are used. In any event, participating in a lottery is inherently speculative, and no applicant can have any assurance that its application will be granted. Nor are the applicants at risk of being found in noncompliance with some new "duty" as a result of the use of competitive bidding. Any duties associated with the RSA license only arise after an applicant is selected as the licensee, and do not vary depending on the method of awarding the license. Were the Commission to impose new duties for applicants as part of a new process, each existing applicant would be given an opportunity to amend its application to fulfill any prerequisites for participation in an auction. Therefore, there is no threat that the existing applicants would be penalized for not having fulfilled duties which may arise under a competitive bidding procedure.

B. Even if Using Auctions Were Considered Retroactive, Doing So Would Be Lawful.

Despite pro-lottery commenters' assumption that "retroactivity" is synonymous with illegality, rule changes are not necessarily unlawful simply because they have a retroactive effect. Courts evaluate retroactive rules by applying a balancing test, in which the harms of the rule are weighed against its benefits. The D.C. Circuit has already considered this very issue, when the

Commission changed its process for awarding cellular licenses from comparative hearings to lotteries. In the Maxcell case, the court found that applying the new rules, even when previously filed applications were still pending, was lawful because "the mischief of frustrating the interests the rule promotes" far outweighs the lack of "the ill effect of the retroactive application" of the rule.[18] The same analysis applies to changing from lotteries to auctions.

First, it is "unquestionable the Commission's overriding concern with efficient processing of many applications for cellular licenses . . . justifies the Commission's decision" to use a more efficient method of awarding licenses. Maxcell, 815 F.2d at 1554. Congress found that auctions will serve the public interest in that they promote the "development and rapid deployment of new technologies, products, and services for the public, including those residing in rural areas, without administrative or judicial delays."[19] Furthermore, Congress gave the Commission auction authority specifically because it found that the lottery system was not only inefficient but, worse, often rewarded speculative applicants who then failed to construct the facilities, contrary to the public interest. Relotterying the RSA markets would clearly frustrate these legislative objectives.[20]

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[18] Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1554 (D.C. Cir. 1987).

[19]H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 254 (1993).

[20]See MMDS Lottery Order, Dissenting Statement of Chairman Hundt, 10 FCC Rcd at 9738, 9745-46: "It is not an oversimplification to say that the Commission's extensive experience with lotteries and its recent experience with auctions lead to two straightforward principles that should be the starting point for our thinking

On the other side of the balancing equation, the existing applicants would not be deprived of their rights or forced to face increased liability or additional duties, and thus cannot claim to have suffered any material injury from any retroactive effect of competitive bidding. The investment that these applicants made is certainly no greater (and probably much less) than the comparative hearing applicants' investment, and yet the Maxcell court found that investment insubstantial.[21]

Given that the public interest benefits in auctions far outweigh any negative impact that auctions might have on existing applicants, any retroactive effect of competitive bidding rules is lawful.

IV. AUCTIONS WOULD NOT BE UNFAIR.

The proponents of lotteries claim that use of competitive bidding would be unfair because, inter alia, they have detrimentally relied upon the Commission's original decision to use lotteries to award RSA licenses.[22] However, as discussed

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about all licensing decisions: Auctions are good. And lotteries are bad. . . . Lotteries not only fail to further the public interest, they actually harm it."

[21]Many commenters claim that their "business plans" relied on the lottery system. E.g., Comments of AALA at 8. But it is simply not credible that any applicants would have invested in an alleged "plan" based on the mere chance of winning a lottery. In fact, most RSA applicants filed virtually identical applications in dozens or more markets, in the hope that they would literally get lucky. That is not justiciable reliance.

[22]Comments of AALA at 5; CFL at 15-16; TMC et al. at 6; RSAOG at 5.

below, the alleged harms from a decision to abandon the lottery procedure simply do not render the use of competitive bidding unfair.

1. Post-Lottery Expenditures. Several parties claim that use of auctions would waste the money they spent in the post-lottery proceedings which resulted in disqualification of the tentative selectee. At the outset, it is important to note that, of the six markets mentioned in CCPR's petition, only three were the result of litigation by these parties. The Commission cannot base a rulemaking decision of general applicability on claims of moneys spent on only some of the open RSAs.

Even focusing only on the three markets where these applicants undertook expenditures, the fact is that they did so voluntarily to oust the tentative selectee, not to win the license. If those efforts were unsuccessful, the expenditures would have been in vain; even if ultimately successful, no applicant could assume -- with literally hundreds of other applicants participating in a lottery -- that it would win the relottery. In fact, these applicants achieved their goal of preserving the availability of the RSA license and the opportunity to obtain the license through FCC procedures. As long as these applicants are not barred from participating in an auction (which they would not be), they still have the opportunity to capitalize on any investment of resources by continuing to seek the RSA license.

2. Application Expenses. Expenditure of resources in preparation and prosecution of applications cannot be claimed as a basis for detrimental reliance on use of the lottery procedure. Any party that wishes to obtain an FCC radio license must use its resources to submit an application. Those costs must be

absorbed by the applicant whether the application is granted or denied. And, as the Maxcell court found, such expenses do not prohibit rule changes affecting prior-filed applications; the Commission's choice of processing procedure has no bearing on whether an applicant expends its resources on submission of an application; rather, the deciding factor is "the ability of the applicant to fund and construct a system in each market" for which it applies. 815 F.2d at 1555.

3. Lack of Notice. The applicants for these RSAs cannot claim harm from the fact that the Commission did not place then "on notice" of the potential use of auctions to award licenses under the circumstances here. The Commission has already conducted the lottery which these applicants expected when they filed their applications. The applicants have not suggested that they filed their applications in reliance on a second lottery. Any claim of harm from not knowing that an auction would be substituted for a relottery is attenuated and speculative.

4. Consistency with Unserved Area Lottery Order. The lottery applicants last argue that since the Commission chose to lottery the unserved area cellular markets, it should do so for the open cellular RSAs.[23] But, as CCPR showed in its petition, cellular unserved areas and RSAs, and the respective applicants for these markets, are not similarly situated. The rationale that had been used for lotteries in that context simply does not apply here.[24] The Commission there relied on the

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[23]Comments of Moving Phones, at 7; TMC et al. at 13; RSAOG at 10-11.

[24]Moreover, two of the Commissioners in office today have vigorously opposed the use of lotteries for pre-Budget Act applications. Unserved Area Lottery Order, Dissenting Statement of Chairman Hundt, 9 FCC Rcd at 7394; MMDS

following considerations: (1) the unserved area applications had never gone to lottery, (2) the areas were of questionable commercial value, (3) unserved area lottery winners would have anti-trafficking obligations that discouraged speculation, (4) the applications had been recently filed, and (5) the Commission had had no experience with the then-new auction authority. As demonstrated in BANM's Comments (at 7-11), not one of these considerations applies to the cellular RSAs. The Unserved Area Lottery Order is simply inapplicable.[25]

V. THE AUCTION MUST BE OPEN TO ALL INTERESTED BIDDERS, INCLUDING HOLDERS OF INTERIM OPERATING AUTHORITY.

Some of the pro-lottery commenters argue that, even if the Commission decides to replace the discredited lottery system with competitive bidding, it should nonetheless restrict eligibility for that auction. They contend that no one other than the original lottery applicants should be allowed to bid, and parties

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Lottery Order, Separate Statement of Commissioner Ness, 10 FCC Rcd at 9758, 9760 (noting harms resulting from speculative applications which lotteries encourage, and finding that "the practical result of a lottery in this instance is very likely to be the precise result Congress sought to eliminate when it gave the FCC auction authority.").

[25]The MMDS Lottery Order is also inapposite. There, too, the Commission (over the dissent of Chairman Hundt and Commissioner Ness) relied on considerations that do not apply to cellular RSAs: the MMDS applications had never gone to initial lottery, the license service areas were being changed, the "expected low commercial value" of the MMDS channels, and the MMDS licensees would be subject to strict build-out and anti-trafficking rules. 10 FCC Rcd at 9631-33.

holding interim operating authorizations should also not be eligible.[26] While it may be understandable that the pro-lottery parties would want to keep new parties from competing for the licenses in the auction, their attempts to suppress competition are unsupportable and should be rejected.

First, there is no legal basis to restrict participation in the auction to the original applicants. Nothing in the statutory provisions governing competitive bidding, nor the Commission's generic auctions rules, places such limits. The reason is apparent -- enabling maximum participation serves Congress's goals of "promoting economic opportunity and competition," "recovery for the public of a portion of the value of the public spectrum resource," and "avoidance of unjust enrichment." Section 309(j)(3). As long as interested bidders meet U.S. citizenship and other qualifications tests, the auction system allows them to participate.

Second, opening up the auction to all interested parties will stimulate the most vigorous price competition for the RSA licenses, while restricting eligibility will frustrate that competition. Confining eligibility here cannot be reconciled with the Commission's pro-competitive policies, and would be particularly

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[26] E.g., Comments of RSA Applicants at 3-6, TME et al. at 7. The Commission should not be swayed by the fact that more commenters opposed than favored auctions, given the frequent duplication in the arguments made by auction opponents on this as well as other issues. Compare, e.g., Comments of AALA at 13 ("The Commission should not be misled by CCPR's Petition into relying on CCPR and other holders of IOAs in the unlicensed cellular markets to deliver a windfall for the Treasury at auction.") with Comments of Crystal at 7-8 ("The Commission should not be misled by CCPR's Petition into relying on CCPR and other holders of IOAs in the unlicensed cellular markets to deliver a windfall for the Treasury by bidding up the prices for the Unlicensed Markets at auction.").

inappropriate given the long passage of time since the pending applications were filed, more than seven years. The Commission would have no rational basis to conclude that restricting an auction to only those applicants (most of whom did not even bother to respond to the instant proceeding) would achieve Congress's objectives in awarding licenses by competitive bidding. To the contrary, the Commission in fact has acknowledged that using auctions would involve opening bidding to new applicants.[27]

Third, there is ample precedent for the Commission to dismiss pending applications -- particularly those as stale as the 1989 applications involved here -- and open up the licensing process to new applicants. For example, when the Commission revised its rules for the Private Operational-Fixed Microwave Service to permit the transmission of point-to-multipoint video and other services, it already had on file 1,400 prior-filed applications. It decided to dismiss all of those applications, even though they had been subject to "cut-off," and open a new filing window for all parties who wanted to provide these services.[28]

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[27]Even when it decided to opt for lotteries for the cellular unserved area licenses, the Commission acknowledged that auctions would necessarily involve participation by new entities, for it considered "the time that may be needed to accept new applications from new parties." Unserved Area Lottery Order, 9 FCC Rcd at 7392. Accord, MMDS Lottery Order, 10 FCC Rcd at 9633 (if auctions were used, existing applicants would be dismissed "without prejudice to participate in a future BTA auction").

[28]Various Methods of Transmitting Program Material to Hotels and Similar Locations, Memorandum Opinion and Order, 54 RR 2d 439, 450 (1983).

One of the pending POFS applicants sought reconsideration, claiming that it had a "right" to enforcement of the original "cut-off" rule. The Commission disagreed, ruling that applicants had no legal right in a cut-off date, and that it could dismiss previously-filed applications and reopen a filing process when that action was in the public interest:[29]

> "Cut-off" protection is not an absolute property right. Any "cut-off" protection our applicants receive is incidental to the primary purpose of our "cut-off" rules, i.e., the orderly functioning of our processing of applications. The Commission has consistently indicated that under the appropriate circumstances an applicant's "cut-off" protection may be withdrawn when the Commission finds that the public interest so requires. See Faith Center, 51 RR 2d 615, 621 (1982), 89 FCC 2d 1054 (1982)); Bronco Broadcasting Company, Inc., 58 FCC 2d 909, 911 (1976); see also Carlisle Broadcasting Associates, 59 FCC 3d 885 (1976). To conclude otherwise would be tantamount to elevating the "cut-off" protection claimed by one petitioner to a position superior to the Commission's statutory obligation to "make rules and regulations and prescribe such restrictions and conditions which in its view are necessary to carry out the provisions of the Act. . . . .' Even though many of the applicants may have achieved some "cut-off" protection, the public interest clearly warrants our creating a new "cut-off" period.

The Commission there pointed to the fact that the POFS applicants were all treated comparably, and that all could refile their applications under the modified rules. This is also true here. The original RSA applicants will all be treated identically, and all will be eligible to participate in the auction.

Fourth, some of the pro-lottery commenters claim that holders of interim operating authority (IOA) cannot participate in the auction. They fail to establish,

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[29]Various Methods of Transmitting Program Material to Hotels and Similar Locations, Memorandum Opinion and Order, 56 RR 2d 305 (1994).

however, why the limited precedent they point to is at all relevant to auctions. The restriction on IOA holders from competing for licenses was a principle that grew out of the comparative hearing process for broadcast stations.[30] It was based on the concern that, were an IOA holder allowed to go to hearing with other applicants, it would have an unfair advantage. The IOA holder could, for example, point to the service it was providing as evidence of its superior record, or argue that its existing service should not be disrupted by choosing another applicant for a permanent authorization. But this concern is irrelevant where a comparative process is not used, for the simple reason that the Commission is not weighing the applicants' relative qualifications.

While pro-lottery commenters cite the LaStar proceeding involving the New Orleans MSA[31] as purported authority for blocking IOA holders from participating in an auction, that case actually undermines their claim. There the Commission granted interim authority to one of two competing cellular applicants even when it was still a party to a comparative hearing, and allowed the interim licensee to pursue its application for permanent authority. The Commission decided that granting interim authority was proper because it could conduct the comparative hearing free of any potential prejudice against the competing applicant. The D.C. Circuit affirmed the Commission. It held that Ashbacker does not prohibit an

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[30]See Community Broadcasting Co. v. FCC, 274 F.2d 753 (D.C. Cir. 1960).

[31]La Star Cellular Telephone Co., 4 FCC Rcd 3777 (1989).